

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs February 13, 2001

STATE OF TENNESSEE v. JASON FRANK JENKINS

Appeal from the Circuit Court for Blount County
Nos. C-11157-61, C11575, C-11376 & C-11377 D. Kelly Thomas, Jr., Judge

No. E2000-00928-CCA-R3-CD
April 27, 2001

Jason Frank Jenkins appeals from the Blount County Circuit Court's revocation of his probationary sentence. Jenkins concedes that he violated the terms of probation, but he argues that the lower court abused its discretion in ordering him to serve the balance of his sentence in the Department of Correction. Because the trial court did not abuse its discretion, we affirm.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which DAVID H. WELLES and JOHN EVERETT WILLIAMS, JJ., joined.

Stacy D. Nordquist (at trial), Maryville, Tennessee; Julie A. Rice (on appeal), for the Appellant, Jason Jenkins.

Paul G. Summers, Attorney General & Reporter; Mark A. Fulks, Assistant Attorney General; Michael L. Flynn, District Attorney General; John Bobo, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

The defendant, Jason Frank Jenkins, was convicted on his guilty pleas in the Blount County Circuit Court of assault, aggravated assault, carrying a weapon with intent to go armed, resisting arrest, possession of a schedule IV controlled substance, DUI, and attempted statutory rape. The trial court imposed an effective three-year sentence to be served via split confinement, and after successfully completing the nine-month confinement portion, he was released on probation. Approximately three months after being released on probation, the defendant tested positive for marijuana. His probation officer obtained a revocation warrant alleging that this violated his terms of probation. Later, the revocation warrant was amended without defense objection to include additional violations: (1) the defendant had incurred new criminal charges, (2) the defendant had failed to report to his probation officer on April 2, 2000 and had failed to attend a sex offender treatment meeting, and (3) the defendant was not attending drug and alcohol treatment meetings.

The matter proceeded to hearing, and the state presented the testimony of the defendant's probation officer, Marcus Miller. Mr. Miller testified that the defendant came under his supervision on October 17, 1999. Mr. Miller allowed the defendant to focus on finding a job at first, and he did not insist that the defendant comply with some of the other probationary requirements, such as drug and alcohol treatment and sex offender treatment. Curiously, Miller testified both that the defendant, on the one hand, spent the first two and one-half months of probation sleeping, drinking and following his desires and that, on the other hand, he and the defendant worked very diligently on finding the defendant a job during the first four weeks of probation. In any event, the defendant became employed and worked steadily beginning in January 2000.

Miller gave the defendant a drug test in early January. Initially, the defendant said the test would be negative, but before Miller received the results, the defendant reported that he had smoked marijuana on New Year's Eve. According to Miller, the defendant did not think marijuana use was as serious as the use of other drugs. Miller also testified that the defendant had missed most of his drug and alcohol treatment meetings since January. The defendant had not obtained the required psychological evaluation or paid the fees associated with sex offender treatment. Miller acknowledged that the defendant had a financial barrier to completing these requirements of probation. Miller had contacted the person who conducted the sex offender treatment to see whether the defendant would qualify for having the costs of the evaluation and treatment paid by the state, but Miller had not received an answer by the date of the hearing. Finally, the defendant had missed several of his weekly "MRT" meetings, and when he did attend, he would sometimes forget his book.

The defendant testified on his own behalf at the revocation hearing. He acknowledged smoking marijuana as a way to relieve stress. He claimed that his New Year's Eve relapse was related to his inability to find employment and to the recent fire which destroyed his family home and killed the family pet. The defendant acknowledged marijuana use on other occasions. He said he usually obtained it from friends, although he admitted buying it on two occasions from an individual whose name he reluctantly provided to the court. The defendant testified that he had been employed full time, with overtime, since January as a warehouse supervisor. He offered a positive letter from his employer as an exhibit to his testimony. He testified that he presently resides in a motel because he and his mother could not live together harmoniously. The defendant claimed that his previous failure to attend various meetings and treatment sessions was related to lack of transportation, although he claimed that he did attend whenever he could. However, he advised the court that he had regained his driver's license and now has his own vehicle. Although he could not afford the \$300-400 for the sex offender evaluation or the \$25 per meeting for sex offender treatment, he indicated a willingness to undergo psychological testing relative to sex offender treatment if the court would waive the fee. The defendant acknowledged that he had made mistakes but claimed he was trying to address his problems, and he asked the court to give him another chance.

The court found that the defendant had violated his probationary sentence by using marijuana, failing to report to his probation officer, not attending sex offender treatment meetings,

and not regularly attending drug and alcohol treatment meetings. The court noted that the defendant's employment was in his favor, although the overall chance of rehabilitation was not good due to the defendant's failure to take part in alcohol and drug rehabilitation programs. The court revoked the defendant's probationary sentence and ordered that he serve his remaining sentence in the Department of Correction.

The standard of review upon appeal of an order revoking probation is the abuse of discretion standard. *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991). In order for an abuse of discretion to occur, the reviewing court must find that the record contains no substantial evidence to support the conclusion of the trial judge that a violation of the terms of probation has occurred. *Id.* at 82; *State v. Delp*, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980). The trial court is required only to find that the violation of probation occurred by a preponderance of the evidence. Tenn. Code Ann. § 40-35-311(e) (Supp. 2000). Upon finding a violation, the trial court is vested with the statutory authority to "revoke probation and suspension of sentence and cause the defendant to commence the execution of the judgment as originally entered." *Id.* Furthermore, when probation is revoked, "the original judgment so rendered by the trial judge shall be in full force and effect from the date of the revocation of such suspension." Tenn. Code Ann. § 40-35-310 (1997). The trial judge retains the discretionary authority to order the defendant to serve the original sentence. *See State v. Duke*, 902 S.W.2d 424, 427 (Tenn. Crim. App. 1995).

In this appeal, the defendant concedes that bases exist to support the trial court's determination that he had violated the terms of probation. *See State v. Michael Emler*, No. 01C01-9512-CC-00424, slip op. at 4 (Tenn. Crim. App., Nashville, Nov. 27, 1996) (where the defendant admits violation of the terms of probation, revocation by the trial court is not arbitrary or capricious); *State v. Mitzi Ann Boyd*, No. 03C01-9508-CC-00246 (Tenn. Crim. App., Knoxville, Nov. 1, 1996). Thus, the only question we must answer is whether the court abused its discretion in ordering the defendant to serve the remainder of his sentence in the Department of Correction.¹

The court had before it an individual who had repeatedly used an illegal substance in violation of his probationary terms, the most recent use being just two to three weeks prior to the revocation hearing.² The defendant minimized the seriousness of his repeated marijuana use. The defendant initially failed to attend various probation and alcohol and drug treatment meetings due to transportation difficulties; however, this shortcoming continued even after he regained his driver's license and obtained a vehicle.

¹In his brief, the defendant argues that consideration and application of the statutory sentencing principles do not support the trial court's order that the defendant be incarcerated for the remainder of his sentence. However, the defendant is not entitled to all of the requisites of a sentencing hearing at this juncture. *See State v. Howard Luroy Williamson, Jr.*, No. 02C01-9507-CC-00201 (Tenn. Crim. App., Jackson, Sept. 30, 1996) (references to sentencing principles by trial court is "not necessary in determining the appropriate sanction following revocation of probation").

²It is significant that the revocation warrant was served on the defendant more than a month prior to the revocation hearing. Thus, the defendant continued to use marijuana even after he had been served with the revocation warrant and therefore knew that his probationary status was in jeopardy due to his marijuana use.

Given these facts, we cannot say that the trial court abused its discretion in ordering the defendant to serve his sentence in incarceration. *See State v. Darrell Wilson*, No. 02C01-9207-CR-00167 (Tenn. Crim. App., Jackson, Oct. 27, 1993) (appellate court's only function is to determine whether abuse of discretion occurred, not to substitute its own preference for sentence service in place of that ordered by trial court), *perm. app. denied* (Tenn. 1994).

We affirm the trial court's order revoking the defendant's probation and requiring him to serve his sentence in the Department of Correction.

JAMES CURWOOD WITT, JR., JUDGE